No. 89-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Appendix to the Petition for Certiorari. The original opinion of the court of appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the court of appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930 and reproduced at Pet. App. 49a. The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the

Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act, 46 U.S.C. §§ 183b & 183c; 28 U.S.C. §§ 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

STATEMENT OF THE CASE

This case is a tort action against an out-of-state corporation for personal injuries occurring on an ocean cruise. The action was brought under the admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h).

Respondents Eulala and Russel Shute filed this suit in the United States District Court for the Western District of Washington, seeking to recover damages for injuries allegedly occurring when Mrs. Shute slipped and fell during a seven-day cruise on the M/V TROPICALE from Los Angeles to Puerto Vallarta, Mexico. Pet. App. 2a-3a. The fall occurred in international waters off the coast of Mexico, while Mrs. Shute was on a guided tour of the ship's galley. *Id.* Respondents are residents of Washington State. Pet. App. 2a.

The TROPICALE is operated by Petitioner Carnival Cruise Lines, Inc., a Panamanian corporation with its

principal place of business in Miami, Florida.[1] Pet. App. 2a. The courts below found that Carnival's sole activities in Washington State consisted of soliciting business by advertising in local newspapers, providing brochures and seminars for travel agents, and paying a 10 percent commission to travel agents. *Id.* The courts below found that Carnival owned no property in Washington, maintained no office or bank account in Washington, paid no business taxes in Washington, was not registered to do business in Washington, and did not operate ships that called at Washington ports. *Id.* In 1985 and 1986, Carnival's revenues from residents of Washington were 1.29 and 1.06 percent, respectively, of its total revenues. Pet. App. 7a.

Respondents purchased their tickets from Carnival through their local travel agency. Carnival issued the tickets in Florida upon receipt of full payment there and sent the tickets to respondents in Washington. Pet. App. 2a.

The face of the passenger's copy of the ticket contract contained the following statements printed prominently in the lower left-hand corner:

> SUBJECT TO CONDITIONS OF
> CONTRACT ON LAST PAGES
>
> **IMPORTANT!** PLEASE READ CONTRACT
> ← ON LAST PAGES 1, 2, 3

J.A. 16.[2]

The same page contained the following statement on the lower right-hand corner:

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[1] Carnival Cruise Lines, Inc., has no parent company or subsidiary (other than wholly-owned subsidiaries) to be listed pursuant to Rule 29.1.

[2] The specimen passenger ticket reproduced in the Joint Appendix is identical to the tickets received by respondents and is reproduced at its original size. The original is in the record as an exhibit to Declaration of Eulala Shute, CR 18.

> The provisions on the reverse hereof are
> Incorporated as though fully rewritten

Id.

Beginning on the reverse of the passenger's copy, the ticket contained the terms of the passage contract. The following caption appears at the beginning of the contract terms:

> TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

J.A. 16.

Paragraph 3(a) of the contract provides as follows:

> The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

Id.

The contract includes the following forum selection clause at paragraph 8:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

Id.; Pet. App. 3a.

Respondents filed this suit in the United States District Court for the Western District of Washington and served Carnival with a summons pursuant to the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185, as provided by Rule 4(e) of the Federal Rules of Civil Procedure.[3] Pet. App. 4a-5a. Carnival moved

[3] Respondents' complaint is reproduced at J.A. 4-6. Petitioner's amended answer is reproduced at J.A. 7-10.

for summary judgment dismissing the case for lack of personal jurisdiction or on the basis of the forum selection clause. Carnival alternatively sought transfer to the United States District Court for the Southern District of Florida. Pet. App. 3a.

The Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, granted Carnival's motion for summary judgment and dismissed the case for lack of personal jurisdiction. Pet. App. 60a-65a. The district court held that Carnival did not have sufficient contacts with the forum state to support the exercise of long-arm jurisdiction consistent with the due process clause of the Fourteenth Amendment. Pet. App. 64a. The district court found that personal jurisdiction was lacking because Carnival "did not purposefully avail itself of the benefits and protections of Washington law" through its contacts with that state, Pet. App. 63a, and because the action "did not 'arise out of' or 'result from' " those contacts, Pet. App. 64a. The district court did not consider the effect of the forum selection clause in the ticket passage contract. Pet. App. 60a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in an opinion authored by the Honorable Betty B. Fletcher and joined by Circuit Judges Robert Boochever and Stephen S. Trott.[4] Pet. App. 25a-48a. The court of appeals agreed with the district court that Carnival's activities relating to the forum state were not sufficient to support the exercise of general *in personam* jurisdiction. Pet. App. 30a-31a. The court of appeals held, however, that defendant had purposefully availed itself of the laws of Washington, Pet. App. 31a-34a, that respondent's claim "arose out of" Carnival's advertising and promotional activities directed at the forum state, Pet. App. 34a-41a, and that the exercise of jurisdiction would be reasonable, Pet. App. 41a-

[4] Appellate jurisdiction was based on 28 U.S.C. § 1291.

44a. The court of appeals found that Carnival was consequently subject to the exercise of "specific" *in personam* jurisdiction in Washington State. Pet. App. 44a.

At the request of the parties,[5] the court of appeals also decided whether the forum selection clause in the ticket contract was enforceable. The court of appeals noted that this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") established that forum selection clauses are presumptively valid. Pet. App. 45a. The court of appeals held, however, that the clause here was not enforceable because the provision was not freely bargained for, Pet. App. 46a, and because requiring respondents to sue in Florida would effectively deprive them of their day in court, Pet. App. 47a-48a.

After Carnival filed a timely petition for rehearing with suggestion for rehearing *en banc*, the court of appeals withdrew its opinion and certified to the Washington Supreme Court the question of whether the Washington long-arm statute conferred personal jurisdiction over Carnival for the claim in this case.[6] Pet. App. 49a. The Supreme Court of Washington held that the state long-arm statute extended as far as permitted by the due process clause and, relying upon the withdrawn opinion of the court of appeals, held that assertion of personal jurisdiction in the present case would not violate due process. Pet. App. 58a-59a. The court of appeals then issued an amended opinion, reaching the same conclusions as its original opinion. Pet. App. 1a-24a.

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[5] Pet. App. 45a n.6.

[6] This question was apparently certified because a recent decision by an intermediate appellate court in Washington had held there was no long-arm jurisdiction on similar facts. *Banton v. Opryland U.S.A., Inc.*, 53 Wash. App. 409, 767 P.2d 584 (1989). *See* Pet. App. 51a-52a.

SUMMARY OF ARGUMENT

1. The cause of action here did not "arise out of or relate to" defendant's activities in the forum state, as required for the exercise of specific jurisdiction. Rather, the cause of action arose out of allegedly negligent conduct by defendant outside the forum state. The "but for" standard announced in this case by the court of appeals would dramatically, and improperly, expand the availability of personal jurisdiction over non-resident defendants who do not engage in continuous and systematic activities in the forum state.

2. If the forum state can exercise personal jurisdiction, then the forum selection clause in the ticket contract should be enforced, and the action dismissed or transferred to the contractual forum. The clear consensus of the courts of appeals, except the court of appeals in this case, is that a contractual condition in a ticket is *prima facie* valid if the ticket reasonably communicates to the passenger the existence of additional conditions and directs the passenger's attention to those conditions. The tickets involved here did so with prominent notices to the plaintiffs.

Under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"), the forum selection clause is valid. The focus of the court of appeals on whether the clause was "freely bargained for" disregards commercial realities and also fails to take into account this Court's treatment of pre-printed contracts in its recent arbitration cases. In basing its decision to strike down the clause on "public policy" grounds, the court of appeals improperly disregarded the limited reach of the relevant statutory provisions.

3. Proper resolution of the two issues in this case will have the incidental effect of promoting judicial efficiency by increasing the predictability of forum selection and reducing the need for preliminary litigation over that subject.

ARGUMENT

I. THE DISTRICT COURT LACKS *IN PERSONAM* JURISDICTION BECAUSE THE CAUSE OF ACTION DOES NOT "ARISE OUT OF OR RELATE TO" ANY ACTIVITIES OF DEFENDANT IN THE FORUM STATE

Under Rule 4(e) of the Federal Rules of Civil Procedure, amenability to service in this admiralty case depends upon the permissible reach of the Washington long-arm statute. *See Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 103-05 (1987). Because the Washington statute has been construed to reach the maximum extent permitted by the Fourteenth Amendment, the issue before the Court is whether the assertion of *in personam* jurisdiction in this case satisfies the requirements of the Due Process Clause. *See* Pet. 13 & n.14. This Court's decisions provide that the issue must be decided by determining whether respondents' action in negligence, seeking damages for injuries allegedly sustained during a slip and fall on a ship located in international waters, arises out of or relates to Carnival's solicitation efforts in Washington. Petitioner respectfully submits that *in personam* jurisdiction cannot be maintained under the facts presented because Carnival's limited contact with Washington is of no substantive relevance to the cause of action.

A. The Due Process Clause Requires A Substantive Connection Between The Cause Of Action And A Defendant's Activities In The Forum State To Support An Exercise Of Specific Jurisdiction

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent cases, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes significant limits on the ability of states to employ long-arm statutes to assert jurisdiction over non-

resident defendants. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (citations omitted).

Indeed, although constitutional limitations on personal jurisdiction are associated today with the Due Process Clause of the Fourteenth Amendment, this Court considered the validity of state court jurisdiction even before the advent of the Fourteenth Amendment. *See Burnham v. Superior Court*, 110 S. Ct. 2105, 2109-10 (1990); *D'Arcy v. Ketchum*, 52 U.S. 174, 11 How. 165 (1850). The Court held in *D'Arcy* that the decision of a state court made without jurisdiction was not entitled to recognition under the Full Faith and Credit Clause, noting that such a proceeding had historically been "deemed an illegitimate assumption of power, and resisted as mere abuse." *Id.* at 184. When the Court considered the issue again in *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873), it did so without referring to the Fourteenth Amendment, then in effect; rather, the Court observed:

> Every independent government . . . is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society.

Id. at 469 (quoting *Mackay v. Gordon*, 34 N.J. 286 (1870)).

The Court has recognized that constitutional limits on personal jurisdiction not only protect individual rights, but also "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). "The sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293. As the Court explained two years later in *Insurance Corp. of Ireland v. Companie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982), federalism is not an independent basis for denying personal jurisdiction where a particular defendant has waived its right to object. A state's improper exercise of jurisdiction over an out-of-state defendant is, however, an infringement against both the party and the defendant's state, much as the improper exercise of jurisdiction by a foreign nation over a U.S. citizen would violate both the rights of the citizen and the sovereignty of the United States.[7]

Therefore, it is important for courts resolving questions of personal jurisdiction to consider not simply the convenience of the parties, but also the legitimacy of a state's interest in adjudicating the dispute.[8] The reasonableness required by the Due Process Clause "is not the reasonableness of the burden but the reasonableness of the particular State's imposing it."[9] For example, a defendant might find it less burdensome to litigate in an out-of-state court just across the border than in a more distant court within his own state; yet, if the defendant does not have minimum contacts with the foreign state,

[7] The Court in *D'Arcy*, in fact, relied on "the well-established rules of international law" in holding that a state need not give full faith and credit to the prior proceedings of a state lacking jurisdiction. 52 U.S. at 184.

[8] *See generally* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77, 84-86; Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689 (1987).

[9] Brilmayer, *supra* note 8, at 85.

then that state lacks jurisdiction, while the defendant's state of residence unquestionably has it. The "convenient" sovereign is not necessarily the legitimate one.

In determining whether "minimum contacts" exist so as to permit an assertion of jurisdiction, this Court has distinguished "general" and "specific" *in personam* jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8, 9 (1984); *Calder v. Jones*, 465 U.S. 783, 787 (1984). When the cause of action does not arise out of or relate to the defendant's activities in the forum state, those activities must be sufficiently continuous and systematic to make the assertion of *in personam* jurisdiction reasonable; if they are, then the forum state can exercise general jurisdiction over the defendant notwithstanding the lack of a connection between the activities and the cause of action. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952).[10]

On the other hand, "specific" jurisdiction can be asserted despite a lesser showing of contacts with the forum state, so long as "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros*, 466 U.S. at 414). In cases involving specific jurisdiction, "the Court has said that a 'relationship among the defendant, the forum, and the litigation' is

[10] It has been suggested that "general" jurisdiction under long-arm statutes should be confined to corporations, on the theory that continuous and systematic activities by such artificial entities are the equivalent of physical presence within the jurisdiction by a natural person. *See Burnham v. Superior Court*, 110 S. Ct. at 2110 n.1 (opinion of Scalia, J.). In the present case, the court of appeals held that Carnival's contacts with the forum state were not sufficient to support an assertion of general jurisdiction. Pet. App. 6a-7a.

the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Where the availability of specific jurisdiction has been at issue, although this Court has not yet sought to define a bright-line test, it has consistently looked to the substantiality of the connection between the cause of action and the defendant's activities in the forum state. The Court noted in *International Shoe* not only that the in-state activities of the defendant corporation "were systematic and continuous," but also that "[t]he obligation which is here sued upon arose out of those very activities." 326 U.S. at 320. The Court explained that it was the existence of such a connection that justified the assertion of jurisdiction:

> But to the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319.

In *Keeton*, the Court noted that the activities of defendant Hustler Magazine, Inc. in the forum state might not have been sufficient to support general jurisdiction, but held that defendant's magazine sales supported jurisdiction over the libel suit, as the suit arose "out of the very activity being conducted, in part," in the state. 465 U.S. at 779-80. *See also Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In rejecting Minnesota's maintenance of *quasi in rem* jurisdiction based on an unrelated insurance policy in *Rush v. Savchuk*, 444 U.S. 320 (1980), the Court pointed out, "The insurance policy is

not the subject matter of the case, however, nor is it related to the *operative facts* of the negligence action." 444 U.S. at 329 (emphasis supplied).

Implicit in the foregoing cases is the assumption that the cause of action and the in-state activity should be sufficiently related to justify fully the application of the forum state's own law to the dispute. Whether or not the forum state actually would apply its own law, specific jurisdiction should be supported by a substantive nexus such that the forum state could legitimately regulate the particular activity leading to the alleged injuries.[11] This link between the state's jurisdiction to regulate, on one hand, and its jurisdiction to adjudicate, on the other, is implied in *International Shoe*, which upheld the exercise of jurisdiction by Washington State courts where the actions were "brought to enforce" obligations arising out of or connected with defendant's in-state activities. 326 U.S. at 319.

B. In This Case, There Is No Substantive Connection Between Defendant's Forum State Activities And The Cause Of Action

The court below acknowledged that it would have found jurisdiction lacking if it had employed the standard adopted by some other circuits, which had held that a tort action against a provider of transportation or accommodation, based on an accident occurring during travel in another state, does not "arise out of" the business solicitation or contracting in the plaintiff's home state. Pet. App. 10a-12a. The court stated that if it had employed the more stringent standard, "we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE," Pet. App. 12a, not out of any activities of defendant in

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[11] *See* Stein, *supra* note 8, at 703, 754-56. In the present case, of course, federal rather than state law applies, but the same kind of analysis is required because Rule 4(e) incorporates state law.

Washington State. The court instead announced the adoption of a "but for" standard, however. Pet. App. 15a-17a. The court of appeals held that "but for" Carnival's promotional and advertising activities in the State of Washington, Mrs. Shute would not have taken the cruise on which she was injured, and that her action therefore "arose out of" the promotional and advertising activities. Pet. App. 17a.

Petitioner submits that the Ninth Circuit should have followed the approach of a majority of the circuits and states on this issue [12] and held that the action, based on out-of-state personal injuries, did not arise out of or relate to defendant's in-state solicitation. No element of Respondents' cause of action is based upon Carnival's contact with Washington; the presence or absence of advertising by Carnival in Washington is immaterial to the success of Respondents' claim.

This case is unlike those such as *Burger King* and *McGee*, in which a contract dispute "grew directly out of 'a contract which had a *substantial* connection with that State.'" *Burger King*, 471 U.S. at 479 (quoting *McGee*, 355 U.S. at 223) (emphasis in original). Here, as in *Helicopteros*, the injury did not occur in the forum state, nor did any aspect of the alleged negligence. If the ticket contract between Carnival and plaintiffs is said to be the result of Carnival's solicitation activities in Washington, the cause of action nonetheless does not arise out of or relate to those activities. Plaintiffs are suing in tort, not on the contract.[13] Plaintiffs allege that "members of the vessel's crew negligently placed water on the vessel's deck in the galley area," J.A. 5, and that "the crew of the

[12] *See also* Pet. 10 n.9 (collecting authorities).

[13] Not only is the requirement of due care imposed by tort law, but federal admiralty law prohibits any contractual derogation from that standard. *See* 46 U.S.C. § 183c (prohibiting contract clauses that purport to relieve the carrier of liability for negligence leading to loss of life or bodily injury).

vessel negligently failed to provide her with adequate medical care," J.A. 6. Plaintiffs sought "damages *arising out of the personal injuries* of Eulala Shute" and for Mr. Shute's "loss of consortium." *Id.* (Emphasis added.)

Although Washington State has the authority to regulate advertising by cruise lines within its borders, for example, it has no authority to regulate the safety of premises outside its territory. The Ninth Circuit's decision, however, permits Washington State to employ its authority over in-state solicitation to create long-arm jurisdiction over a lawsuit concerning allegedly unsafe conditions outside Washington—conditions that would otherwise not be subject to Washington's control.

C. The Test Of "But For" Causation Adopted By The Ninth Circuit Is Open-Ended And Unworkable

The Ninth Circuit suggested that a "but for" standard "preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum," Pet. App. 16a. Yet, because the Ninth Circuit's "but for" standard requires merely "*some* nexus," not a substantive nexus, the actual reach of the standard is all but limitless. By greatly expanding the range of cases in which jurisdiction would be available despite a defendant's tenuous contacts with the forum, the "but for" standard comes close to eliminating the distinction between specific and general jurisdiction.

Professor Brilmayer, in criticizing the reach of the "but for" standard, hypothesizes a suit filed in Connecticut for injuries sustained in a Massachusetts auto accident after the defendant had passed *through* Connecticut en route to Massachusetts.[14] But for the trip through Connecticut, defendant would not have been in Massachusetts, and the Massachusetts accident would not have occurred; under the "but for" standard, the cause of action thus

[14] Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1445, 1458 (1988).

"arises out of or relates to" defendant's contacts with Connecticut. Professor Brilmayer notes that the "but for" standard, lacking any requirement of a substantive nexus, can be stretched further still. "For example, it is a 'but for' cause of the accident that the defendant and plaintiff were born: does this mean that specific jurisdiction analysis is appropriate in their states of birth, even if they left them years ago?" [15]

Professor Brilmayer's hypotheticals are not entirely fanciful. In *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), the Supreme Court of California considered whether due process permitted the courts of that state to hear a claim stemming from a collision in Nevada. The defendant, a Nevada resident, was an interstate truck driver en route to California when the collision occurred south of Las Vegas. 545 P.2d at 264-65. The Court found that California could not exercise general jurisdiction, *id.* at 267, but that it could exercise specific jurisdiction. The Court observed that defendant had long been engaged in trucking between Nevada and California and concluded that "[t]he accident arose out of the driving of the truck, the very activity which was the essential basis of defendant's contacts with this state." *Id.* at 268.

The *Helicopteros* case presents another example of the far-reaching effect of a "but for" test of specific jurisdiction. Defendant, a Colombian corporation, was sued in Texas for injuries stemming from the crash of one of its helicopters in Peru. 466 U.S. at 409-10. Defendant had engaged in negotiations in Texas for the provision of the helicopter services, had purchased helicopters and other items from a Texas company, and had sent pilots, management, and maintenance workers to Texas for training. Payments to defendant for the helicopter services had been drawn upon an account at a Texas bank. Other than those contacts, defendant had no contacts with Texas. *Id.*

[15] *Id.* at 1462.

at 411. This Court did not discuss the availability of specific jurisdiction in that case because all of the parties conceded that the cause of action did not arise out of and was not related to defendant's activities within Texas. *Id.* at 415. The dissenting Justice rejected that view, however:

> Viewed in light of these allegations, the contacts between Helicol and the State of Texas are directly and significantly related to the underlying claim filed by the respondents. The negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash. Moreover, the helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas.

Id. at 426.

Under this approach, although neither the accident nor the alleged negligence occurred in Texas, *id.* at 412 n.5, that state would have been able to exercise specific jurisdiction on the basis of defendant's incidental contacts with it. The Ninth Circuit in the present case implicitly adopted the approach of the *Helicopteros* dissent in its interpretation of the "arising out of or relating to" requirement. In doing so, the Ninth Circuit failed to require the "'relationship among the defendant, the forum, and the litigation'" that constitutes "the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Apparently in recognition of the difficulties created by its "but for" test, the court of appeals argued that the third part of its test for specific jurisdiction, whether "the exercise of jurisdiction would be unreasonable," adequately protects defendants from suit based on contacts that are "too attenuated." Pet. App. 16a. The factors of reasonableness considered by the court of appeals, apparently

derived from the decision in *Burger King*, 471 U.S. at 477, are

> the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum.

Pet. App. 17a.

The court's "reasonableness" inquiry cannot properly substitute for a requirement of an adequate connection between the cause of action and the forum. Because the court of appeals places the burden of showing unreasonableness on the defendant, Pet. App. 17a, the reasonableness inquiry cannot be substituted for a weakened "arising out of" requirement without also shifting the burden of proof on personal jurisdiction from the plaintiff to the defendant. More important, this Court in *Burger King* indicated that the considerations of reasonableness were to be applied, if at all, *after* there had been a showing of minimum contacts, 471 U.S. at 476.[16] Further, the reasonableness factors are fundamentally different from the minimum contact inquiry in that a lack of minimum contacts entails a lack of personal jurisdiction, *International Shoe*, while reasonableness factors "usually may be accommodated through means short of finding jurisdiction unconstitutional," such as application of different choice-of-law rules. 471 U.S. at 477.

[16] There is some ambiguity in *Burger King* as to this point. Initially, the opinion states that reasonableness factors may be considered "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State," 471 U.S. at 476. Later, however, the opinion states, "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477.

Presumably, the discussion of reasonableness in *Burger King* does not imply that independent consideration should be given to a state's interest in providing a forum for plaintiffs who reside within its borders, making it a possible basis for jurisdiction where defendant's contacts would otherwise not be sufficient. Apart from the resulting infringement on the defendant's due process rights, such an approach would disregard the precisely countervailing interest that other states have in providing a forum for their residents who are *defendants*. As a matter of relative state interests, there is no apparent basis for giving greater weight to the inconvenience of plaintiffs as a class than to that of defendants as a class.

The court of appeals further indicated in dictum that "where a defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiffs' harm may be required." Pet. App. 15a n.7. Because Carnival "had engaged in significant and continuing efforts to solicit business in the forum state," *id.*, the court found that such a "close nexus" was not required in the present case. The resulting three-tier jurisdictional scheme is wholly without support in this Court's cases. This Court should now make clear that the requirement of a "close nexus" between the in-state activities and the cause of action is not simply to be engrafted onto the requirements for specific jurisdiction in some exceptional cases, but rather is an integral requirement to be applied in all specific jurisdiction cases.

The Ninth Circuit's test, if permitted to stand, would significantly affect members of numerous types of businesses that commonly solicit business from throughout the United States, but do not have national operations in the form of a network of local offices, sales representatives, or other local activities. Members of the travel industry, in particular, typically provide accommodations in a particular location to individuals from throughout the United States. Under the Ninth Circuit's approach, a hotel or carrier could be sued for personal injuries in the home state of any guest, so long as it engages in some adver-

tising or promotional activity there. Thus, for example, a Vermont bed-and-breakfast that advertises in *Yankee* magazine would have to defend, in any state of the country, lawsuits by guests alleging that its premises were negligently maintained.

This test also makes the determination of personal jurisdiction hinge on seemingly irrelevant factual issues. The existence of personal jurisdiction in a case such as this one, for example, would turn on whether plaintiffs could establish that defendant's promotional activities in Washington State were, in fact, the "but for" cause of the decision to purchase the cruise tickets. With respect to many kinds of goods and services, consumers make their purchases based on numerous sources of information, including magazine articles and word of mouth. Here, plaintiffs would have to establish not only that they were aware of the in-state promotion prior to purchasing the tickets, but also that it was a pivotal factor in the decision. The test of substantive relevance urged here and employed by numerous courts of appeals and state supreme courts [17] would focus the jurisdictional inquiry on facts that are also material to the merits of the case.

II. IF JURISDICTION WERE ESTABLISHED, THIS CASE WOULD HAVE TO BE DISMISSED OR TRANSFERRED IN ACCORDANCE WITH THE FORUM SELECTION CLAUSE IN THE TICKET CONTRACT

In a case involving an international commercial agreement, this Court has held that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). The Ninth Circuit in the present case correctly stated that a ticket for ocean passage is a maritime contract governed by the federal

[17] *See* Pet. 10 n.9 (collecting authorities).

law of admiralty [18] and that *The Bremen* is therefore controlling. *See Shute*, Pet. App. 21a. Despite the presumption mandated by *The Bremen*, the court below found that the clause in this case was unenforceable on two grounds: First, the clause was part of a pre-printed contract and had not been bargained for, and second, enforcing the clause would effectively deprive the Shutes of their day in court. Pet. App. 23a-24a.

The Ninth Circuit's holding is contrary to the federal law of admiralty as delineated by this Court.[19] Its focus on whether the clause was "freely bargained for," Pet. App. 23a, disregards the practical realities of the travel industry and also fails to take into account this Court's treatment of pre-printed contracts in its recent arbitration cases. Finally, in basing its decision on "public policy" grounds, the court below improperly disregarded the limited reach of the relevant statutory provisions, 46 U.S.C. §§ 183b and 183c. The forum selection clause in this case was part of the ticket contract between Carnival and the Shutes and is enforceable under federal admiralty law.

A. The Forum Selection Clause Was A Term Of The Ticket Contract

In *The Majestic*, 166 U.S. 375 (1897), this Court considered the issue of when a term is incorporated into a passenger ticket contract. The carrier in that case issued tickets with a number of conditions on the reverse side, but

[18] *See Archawski v. Hanioti*, 350 U.S. 532 (1956) (steamship passenger contract governed by federal admiralty law); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866) (same).

[19] Even if this were not a maritime case, the validity of the Ninth Circuit's decision would be open to question. With respect to non-admiralty cases, this Court indicated a policy in favor of forum selection clauses in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 31 (1988). *See also id.* at 33 (Kennedy, J., concurring).

with no reference on the front to the existence of additional terms. *Id.* at 376-77. Three passengers sued the carrier for damage to their baggage, and the carrier sought to have its liability limited to £10 as provided by one of the conditions. *Id.* at 376.[20] The Court held that the conditions "were not included in the contract proper, in terms or by reference," and that the passengers were consequently not bound by them. *Id.* at 385.

The courts of appeals, in applying *The Majestic*, have uniformly found conditions in passenger cruise tickets to be incorporated into the contract where the tickets gave reasonable notice to the passengers of the existence of additional terms.[21] Where the ticket did not give sufficiently

[20] Such a condition would now be invalid under 46 U.S.C. § 183c.

[21] *See Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2d Cir. 1990); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir.), *cert. denied*, 370 U.S. 909 (1962); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi*, 604 F.2d 11 (5th Cir. 1979); *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972). In these cases, the courts of appeals enforced the conditions, which required that the passenger notify the carrier of any claims within a specified period or that the passenger bring suit within a specified period.

The decision of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 109 S. Ct. 1633 (1989) is instructive. The Third Circuit in *Hodes* enforced a forum selection clause in a pre-printed passenger ticket contract. The Hodeses brought suit in federal district court in New Jersey for claims based on the October 7, 1985 terrorist seizure of the *Achille Lauro*, on which they were passengers. The district court denied the defendants' motion for dismissal, holding the clause unenforceable. The court of appeals reversed. The court of appeals found that the forum selection clause was reasonably communicated to the Hodeses. The court noted that the cover included a statement referring passengers to the contract terms printed inside; the ticket coupons themselves included a statement that they were "subject to the terms, conditions and regulations set out herein." *Hodes*, 858 F.2d at 910. The page of

conspicuous notice of the existence of additional terms, the courts of appeals have found the conditions not to be incorporated.[22]

The tickets issued to the Shutes, unlike those in *The Majestic*, included prominent notices as to the existence of additional printed terms. *See* pp. 3-4 *supra*; J.A. 15-16.[23] Based upon this Court's decision in *The Majestic*, as consistently interpreted and applied by the lower Federal courts for many years, these tickets gave sufficient notice that the forum selection clause was incorporated into the contract for passage.

However, the Ninth Circuit did not evaluate the ticket to determine whether the existence of additional conditions was reasonably communicated. Indeed, the court assumed, *arguendo*, that the Shutes had *actual* notice of the provision. Pet. App. 23a.[24] Apparently, the court made this assumption because it believed that the forum selection clause was incorporated only if the Shutes had actual notice. No other court of appeals has suggested that the party wishing to invoke a condition in a passenger ticket

terms and conditions was captioned, "TERMS AND CONDITIONS OF CONTRACT OF PASSAGE AND BAGGAGE." The forum selection clause was article 31 of 32 articles. *Id.* Because the various statements gave the Hodeses reasonable notice of the clause, the court held that it was incorporated into the contract for passage. *Id.* at 910-11.

[22] *See Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983).

[23] The specimen passenger ticket reproduced in the Joint Appendix is identical to the tickets received by respondents and is reproduced at its original size.

[24] "Even if we assume that the Shutes had notice of the provision, there is nothing in the record to suggest that the Shutes could have bargained over this language." Pet. App. 23a (footnote omitted).

must demonstrate actual notice, and four circuits have specifically rejected such a contention.[25]

This Court rejected a requirement of actual notice in *New York Central & Hudson River Railway v. Beaham*, 242 U.S. 148 (1916), where it addressed the incorporation of passenger ticket conditions in the railroad context. The Court held that "[i]n the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement *prima facie* valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent." *Id.* at 151-52.

This Court's decisions in *The Majestic* and *Beaham*, along with the uniform consensus of the courts of appeals, indicate that it was unnecessary for the Ninth Circuit in this case to assume actual notice to the Shutes of the forum selection clause. The ticket reasonably communicated the existence of the clause, and thus it must be treated as having been incorporated into the contract for passage.

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[25] *See Geller*, 298 F.2d at 619; *DeNicola*, 642 F.2d at 6; *Hodes*, 858 F.2d at 911-12; *Carpenter*, 604 F.2d at 13 (quoting 80 C.J.S. *Shipping* § 182(5)). The Ninth Circuit itself, in a case involving a limitation of baggage liability in an airline ticket, explicitly adopted the "reasonably communicated" test used in the steamship cases and held the limitation to bind a passenger who had not been shown to have actual knowledge of its terms. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1363-65 (9th Cir. 1987).

Where the passengers did not obtain possession of the ticket at all prior to boarding, the courts of appeals have reached varying conclusions. *Compare Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988) (passengers not bound by limitations included in a master ticket held only by the tour group leader) *with Hodes*, 858 F.2d at 911-12 (passengers bound by tickets held for them by the travel club through which they purchased the tickets until they boarded the ship). *Id.* at 912.

B. The Forum Selection Clause Is Presumptively Enforceable As A Matter Of Admiralty Law

In *The Bremen*, the Court upheld a forum selection clause in a maritime contract requiring that any disputes be brought before the London Court of Justice. The contract was for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the oil rig was damaged while being towed, it was brought to port in Tampa, Florida. The owner of the rig sued in federal district court in Tampa rather than in the contractual forum. 407 U.S. at 3-4. The district court and the court of appeals rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-7.

This Court reversed. Rather than placing the burden on the defendant, the Court held, "the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court stated that the plaintiff must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* At least as to "a freely negotiated international commercial transaction," *id.* at 17, the Court held that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. It is not enough for the plaintiff to show only that "the balance of convenience is strongly in favor of" a non-contractual forum. *Id.* at 19. Even where "the agreement was an adhesive one," the Court stated that "the party claiming should bear a heavy burden of proof." *Id.* at 17.[26]

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[26] This Court's decision in *Stewart Organization* did not overrule *The Bremen*. *Stewart Organization* held that district courts

The Ninth Circuit in the present case cited *The Bremen* as "the starting point for analysis," Pet. App. 21a, but then briskly distinguished *The Bremen* on two grounds. First, the court stated that "in our view the evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision." Pet. App. 22a-23a. The court pointed out that "the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." Pet. App. 23a. Second, the court found that "enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses." Pet. App. 24a. Referring to affidavits submitted by the plaintiffs, the court noted that "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." *Id.* Consequently, the court held the forum selection clause "unenforceable in these circumstances." *Id.*

We submit that these grounds for distinguishing *The Bremen* are insufficient, as explained below.

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sitting in diversity must decide § 1404(a) transfer motions by the terms of § 1404(a) itself, not by the admiralty law standard of *The Bremen*. *See Stewart Organization*, 487 U.S. at 28.

. In a diversity case such as *Stewart*, the validity of the forum selection clause as a matter of contract law is a question of state rather than federal law. A valid forum selection clause could support a motion to dismiss or transfer under § 1406(a), without regard to the other discretionary factors considered in deciding whether a forum is convenient for purposes of § 1404(a). The only issue before the Court in *Stewart* was a motion to transfer under § 1404(a), which was held to be a procedural issue to be decided as a matter of federal rather than state law. 487 U.S. at 32.

Here, the validity of a contractual forum selection clause is a question of federal admiralty law. As in *The Bremen*, a valid clause is enforceable in its own terms and not as one of many factors in the convenience analysis of § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The Bremen* in this regard.

C. Enforcement Should Not Be Denied On The Ground That The Ticket Was A Form Consumer Contract

The difference between this case and *The Bremen* that the court of appeals primarily emphasized was that the contract in *The Bremen* was a negotiated contract between commercial parties, while the contract at issue here is a form consumer contract. The Ninth Circuit's reliance on the unbargained-for nature of the provision here should be rejected. Like many consumer contracts, passenger tickets are rarely, if ever, "freely bargained for," nor would it be practical for carriers to engage in such negotiations with every customer.

Indeed, while the Ninth Circuit spoke only of the lack of bargaining over the forum selection clause, the truth is that *no* aspect of the transaction was "freely bargained for" in the Ninth Circuit's apparent sense of the phrase as involving one-on-one haggling. The same is true of most vacation and business travel arrangements made throughout the United States. That fact does not at all imply, however, that the travelers are being "overweened" into acceptance of contracts. The leisure travel industry is far from a monopolistic one in which consumers must either deal with a single firm or forgo life's necessities.

The Ninth Circuit's approach, if upheld, would threaten a variety of form contracts in the maritime context, such as bills of lading and insurance agreements —contracts that shippers, insurers, and other firms may enter into with commercial and noncommercial customers alike. The *Restatement (Second) of Contracts* describes some of the reasons why standard agreements are essential to many kinds of transactions; these reasons are fully applicable to maritime businesses:

> Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can

> be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.

Restatement (Second) of Contracts § 211 comment a (1981).

The *Restatement* further recognizes that it is reasonable to impose upon parties to certain form contracts, including passenger tickets, a duty to read. According to the *Restatement*, some documents

> may serve both contractual and other purposes, and a party may assent to it for other purposes without understanding that it embodies contract terms. He may nevertheless be bound if he has reason to know that it is used to embody contract terms. Insurance policies, *steamship tickets*, bills of lading, and warehouse receipts are commonly so obviously contractual in form as to give the customer reason to know their character.

Id. comment d. (Emphasis added.)

The approach taken by the Ninth Circuit to this provision in a form consumer contract is also difficult to reconcile with this Court's decisions in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In those cases, the Court upheld arbitration clauses that were incorporated into pre-printed form contracts in transactions between a

brokerage firm and individual customers. The contract provision at issue in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), designating a New York agent for service of process upon Michigan customers, was upheld although it was in a pre-printed contract and was being applied against individuals.

D. The Forum Selection Clause Was Not Unreasonable Or Unjust

In this case, inclusion of the clause in a ticket contract requiring litigation in a particular forum was not an act of overreaching by Carnival. The interstate nature of the travel industry is such that Carnival, like any other provider of sea or air transportation, may carry residents of numerous states on any given trip; a single mishap could lead to the filing of similar or identical claims in courts throughout the country. The forum selection clause is a reasonable means to promote the orderly and efficient resolution of claims that might otherwise have to be litigated in multiple jurisdictions. *See Hodes*, 858 F.2d at 913.[27]

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[27] The issues pertaining to the forum selection clauses in *Hodes* and this case are essentially identical, except that the contractual forum in *Hodes* was Naples, Italy. Having determined that the forum selection clause was reasonably communicated and was thus incorporated into the contract, the court in *Hodes* held that the forum selection clause was enforceable under *The Bremen*. The Third Circuit acknowledged that the contract in *The Bremen* was the product of negotiation between sophisticated businesses, and that the defendants in *Hodes* had a superior bargaining position to the ticket purchasers, but held that the defendants "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. The court pointed out that the defendants were contracting with purchasers worldwide and that the ship itself would enter a number of jurisdictions. As a result, the court found, the defendants had a legitimate interest in seeking certainty as to where suit could be brought against them. *Id.*

The Third Circuit also rejected the view that "trial in the contractual forum will be so gravely difficult and inconvenient" that the Hodeses would "for all practical purposes be deprived of

Moreover, the state selected—Florida—is where Carnival has its principal place of business and where many of its cruises arrive and depart. Such a forum bears a logical relationship to the likely location of documents and witnesses; there is no indication that it was chosen to prevent meritorious litigation from being conducted efficiently or fairly.

Plaintiffs' allegations of inconvenience here do not justify invalidating the forum selection clause under *The Bremen*. Although Washington State was the Shutes' preferred forum, there is no reason why the suit could not have been litigated in Florida. The Shutes have not shown why they would have been unable to secure counsel in Florida, based, if necessary, on the sort of contingent fee arrangement that is typical in personal injury litigation. Further, as the Court noted in *The Bremen*, depositions can be used to avoid much of the incremental expense and inconvenience of litigating in the contractual forum. 407 U.S. at 19.[28]

[their] day in court." *Id.* at 916 (*quoting The Bremen*, 407 U.S. at 18). The Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916. In assessing the practicality of litigation in the contractual forum, the Third Circuit stated that the inquiry is not whether the forum is convenient for the plaintiffs, but whether there are circumstances making it impractical for the dispute to be litigated there at all.

[28] In fact, under some circumstances, a tort claimant in admiralty can be required to litigate in a forum not of his choosing even if there is no forum selection clause. The limitation procedures established by 46 U.S.C. § 185 and by Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims permit the vessel owner to bring an action within six months for limitation of his liability. *See generally* 12 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 3251-56 (1973). After the owner has either transferred his interest in the vessel to a court-appointed trustee or deposited the value of his interest in the vessel with the court, together with certain additional amounts, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U.S.C. § 185. (A vessel owner would normally bring a limitation action under § 185 only in response to an incident of such magnitude that the owner's liability is expected to exceed the value of the vessel.)

Rule F(9) permits transfer of the § 185 action "[f]or the convenience of parties and witnesses, in the interest of justice." The use of that provision, however, entails a transfer of all the claims against the vessel, not just the ones for which the original forum was inconvenient. Thus, even after a transfer, some claimants may have to litigate in an inconvenient forum. According the vessel owner discretion to choose the forum in which claims will be brought, notwithstanding that the chosen forum may be inconvenient for some claimants, is clearly not repugnant to admiralty law. A contractual forum selection clause serves much the same goals as § 185, by permitting the orderly resolution of claims in a single forum.

In some ways, enforcement of the forum selection clause in this case is more reasonable than the situation in *The Bremen*. The Court assumed in *The Bremen* that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability, whereas such a clause would be unenforceable under U.S. admiralty law. 407 U.S. at 3 n.2, 8 n.8. There is, of course, no issue as to choice of law in this case; federal admiralty law will govern the Shutes' claim whether brought in Washington or Florida, and U.S. policies against exculpatory clauses will be protected in either forum. Also, unlike the situation in *The Bremen*, the Shutes will be entitled to appeal any erroneous application of U.S. admiralty law within the U.S. federal court system.

By discussing the factors making the enforcement of the forum selection clause reasonable in this case, we do not mean to suggest that the Court should conduct an open-ended balancing of equities. Such an approach would eliminate the predictability that forum selection clauses are intended to achieve. *See* Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev.

291, 358-60 (1988). "Given the broad spectrum of elements that bear on enforceability, litigants have little clue as to which tack any particular court may take in construing a forum-selection clause." *Id.* at 359-60.[29] Also, by requiring that the court in the plaintiff's chosen forum undertake a fact-intensive inquiry into the circumstances, such a test compels the party asserting the forum selection clause to participate in possibly protracted litigation over its enforceability. *Stewart Organization*, 487 U.S. at 33 (Kennedy, J., concurring). Because this litigation takes place in a forum other than the contractual one, the test undermines the precise substantive right that a forum selection clause is intended to grant.

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[29] Professor Mullenix cites *D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708 (D.R.I. 1983) to illustrate the wide range of circumstances that courts may find relevant. In applying *The Bremen* to a forum selection clause in a commercial contract dispute, the court in *D'Antuono* set forth a nine-factor test: (1) the identity of the law that governs the contract, (2) the place of execution of the contract, (3) the place where the transactions have been or are to be performed, (4) the availability of remedies in the designated forum, (5) the public policy of the forum state, (6) the location of the parties, the convenience of prospective witnesses, and the accessibility of evidence, (7) the relative bargaining power of the parties and the circumstances surrounding their dealings, (8) the presence or absence of fraud, undue influence, or other circumstances, and (9) the conduct of the parties. The court concluded, "While each of these factors has some degree of relevance and some claim to weight, there are no hard-and-fast rules, no precise formulae. The totality of the circumstances, measured in the interests of justice, will—and should—ultimately control." 570 F. Supp. at 712.

E. The Ninth Circuit's "Public Policy" Analysis Of The Forum Selection Clause Improperly Disregarded 46 U.S.C. §§ 183b And 183c

Two provisions of the Limited Liability Act[30] are relevant to this case. Under 46 U.S.C. § 183b, a carrier cannot employ contract conditions imposing a period of less than six months for the passenger to give notice of a claim or less than one year for a passenger to file suit. Under 46 U.S.C. § 183c, a carrier cannot employ contract conditions "purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants," to limit its liability to its passengers, and cannot employ contract conditions "purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor."

The court below sidestepped the applicability of §§ 183b and 183c. Rather than looking first to the relevant statutes to determine whether they are applicable, the court stated that "[b]ecause we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of [§ 183c] on forum selection agreements." Pet. App. 23a n.12. The court then suggested that, notwithstanding the specific nature of the statutory limitations, the decision of Congress to enact the limitations "exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners" and thereby establishes a requirement that courts undertake an "independent examination of the fairness of this type of contract." *Id.*

Neither § 183b nor § 183c prohibit forum selection clauses. Section 183b is concerned only with time limitation clauses that allow a passenger less than six months

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[30] 46 U.S.C. §§ 181 *et seq.* The statute is also known as the "Limitation Act." The relevant provisions, §§ 183b and 183c, are printed at Pet. App. 66a-68a.

to notify the carrier of a claim or less than a year to file suit. The forum selection clause does not violate that prohibition. The first part of § 183c is concerned only with limitations on the amount of the carrier's liability. The forum selection clause does not limit the amount of Carnival's liability. The second part of § 183c is concerned only with clauses lessening, weakening, or avoiding "the right of any claimant to a trial by court of competent jurisdiction"—*i.e.*, arbitration clauses.[31] The state and federal courts of Florida are courts of competent jurisdiction.

In setting forth these specific limitations on passenger ticket contracts, Congress has impliedly approved clauses that fall outside the scope of the regulatory scheme. Thus, the court below drew precisely the wrong conclusion from Congress's silence as to forum selection clauses. By not providing that those clauses were among the abusive conditions that Congress sought to prohibit in §§ 183b and 183c, the statute lends support to their validity.[32] As this

[31] The text of this provision is consistent with the understanding expressed in the relevant House and Senate committee reports. Both the House and Senate committee reports on the 1936 legislation creating the current § 183c stated that the provision was in response to passenger ticket conditions limiting the owner's liability for negligence or providing that "the question of liability and the measure of damages shall be determined by arbitration." S. Rep. No. 2061, 74th Cong., 2d Sess. 6 (1936); H.R. Rep. No. 2517, 74th Cong., 2d Sess. 6 (1936). This understanding of the second part of § 183c as concerned with arbitration clauses was also uniformly expressed by supporters and opponents of the bill during the House committee hearings on it. *See Safety of Life and Property at Sea: Hearings Before the Comm. on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 20, 36-37, 57, 109, 110, 119 (1936).

[32] In the somewhat analogous context of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300 *et seq.*, the First Circuit has upheld a forum selection clause in a bill of lading that required suit in New York. *See Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). The court rejected the argument that a forum selection clause in a bill of lading is invalid under 46 U.S.C. § 1303(8) as a limitation of liability. Section 1303(8), like § 183c, nullifies any clause lessening a carrier's liability. The First Circuit declined to infer from that provision either a specific prohibition on forum selection clauses or a general policy in favor of scrutinizing such clauses for lack of fairness.

Where forum selection clauses in bills of lading required suit overseas, several courts of appeals have held that forum selection clauses are invalid as limitations of liability under § 1303(8). *See Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967); *Union Ins. Soc'y, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724-25 (4th Cir. 1981); *Conklin & Garrett, Ltd. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989). These courts treated forum selection clauses as limitations of liability on the ground that enforcing the clauses could effectively reduce the liability of the carrier; the foreign courts might apply the controlling law differently than U.S. courts, and the clauses create an obstacle for the plaintiff in bringing suit.

The cases interpreting § 1303(8) in this manner may well have been wrongly decided. Like § 183c, § 1303(8) does not expressly prohibit forum selection clauses, and indeed should be read to approve of such clauses by omission. In *William H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 807 (2d Cir. 1955), later overruled by *Indussa*, the Second Circuit rejected the argument that a foreign forum selection clause violated § 1303(8), noting that "if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian [Carriage of Goods by Sea Act]."

Court very recently observed in *Miles v. Apex Marine Corp.*, No. 89-1158 (U.S. Nov. 6, 1990), "'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' [*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).] Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." Slip op. at 4. Here, the court below was not free to invoke "public policy" and go beyond the statutory requirements for passenger tickets.

III. PROPER RESOLUTION OF THIS CASE WILL PROMOTE THE EFFICIENCY AND FAIRNESS OF THE LEGAL SYSTEM BY MAKING FORUM SELECTION MORE DETERMINATE

Although the two issues in this case are conceptually distinct, they parallel one another in that their proper resolution will have, as an incidental effect, salutary consequences for judicial administration. It is appropriate for the Court to take such consequences into account in deciding these issues. The minimum contacts test for *in personam* jurisdiction serves, in part, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." *World-Wide Volkswagen*, 444 U.S. at 292. The fact that enforcement of forum selection clauses would promote efficient resolution of controversies, by reducing "uncertainty and possibly great inconvenience to both parties," was also part of the reason for this Court's decision in *The Bremen* to enforce such clauses as a matter of federal admiralty law. 407 U.S. at 13.

Petitioner's position on each of the issues in this case serves judicial efficiency. Both a strict application of the relatedness test for *in personam* jurisdiction and a policy of upholding forum selection clauses contribute to efficiency by increasing the predictability of the forum and outcome of legal disputes. Both doctrines thus assist parties in ordering their primary conduct and in resolving disputes short of litigation.

Some objection may be raised to these doctrines on the ground that they restrict the ability of a plaintiff to select the forum for litigation.[33] However, respect for a plaintiff's choice of forum is properly based upon a desire to minimize the litigation of threshold issues and a recognition that, as the party initiating the suit, the plaintiff

[33] *See, e.g., Helicopteros*, 466 U.S. at 422-23 (Brennan, J., dissenting); *World-Wide Volkswagen*, 444 U.S. at 308, 312-13 (Brennan, J., dissenting).

must make the initial choice of where to file. There is no constitutional basis, or any other basis, for holding that plaintiffs as a class deserve a greater say than defendants in deciding where cases should be litigated. A doctrine that increases the convenience to plaintiffs by maximizing the available alternatives for a plaintiff's choice of forum makes litigation correspondingly less convenient for defendants.[34] Therefore, it does not offend the general policy behind respecting a plaintiff's choice of forum to limit the range of permissible choice through voluntary agreement, as in a forum selection clause, or by employing a substantive relationship standard in applying the minimum contacts test for *in personam* jurisdiction.

Proper limitations on the choice of forum not only increase predictability, but also reduce the ability of plaintiffs to affect the outcome of lawsuits through manipulative forum-shopping. In an admiralty case such as this one, the choice of forum has a limited effect on the outcome because the case will be heard in a federal court that will apply federal admiralty law. This Court's holding on the personal jurisdictional issue, however, will govern diversity cases and state court cases, where the choice of forum may well affect the choice of substantive law. States may skew their choice-of-law analysis to favor their own law, thereby giving plaintiffs the opportunity to obtain more favorable law by bringing suit there.

The Due Process Clause and the Full Faith and Credit Clause restrict the power of a state to apply its own law unless it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice

[34] Of course, a defendant sued in an inconvenient forum can seek a transfer, on *forum non conveniens* grounds. 28 U.S.C. § 1404(a); *Stewart Organization*. However, such threshold litigation is itself burdensome. Moreover, some states do not recognize the *forum non conveniens* doctrine. *See, e.g., Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Those constitutional restrictions, characterized by the Court as "modest," *Phillips Petroleum*, 472 U.S. at 818, leave the states ample opportunity to require that their own law be applied to disputes in their courts, thus potentially making the outcome of a case turn on the choice of forum. "Being forced to defend in the distant state may be inconvenient and costly, but application of the substantive law of that state could be fatal." [35]

Moreover, even where the forum state does not apply its own law, there is a harm to judicial efficiency. A state court, or even a federal district court, is normally better able to apply the law of the state in which it sits than the law of another state. The parties also have a superior remedy for legal error, or to advocate change in legal doctrine, if they can appeal the decision to appellate courts of the state whose law is at issue. Therefore, although the constitutional limits on assertion of personal jurisdiction and choice of law involve somewhat different considerations, there is a substantial benefit to the judicial system to construe these doctrines so as to minimize the instances in which courts must apply foreign law. There is a similar benefit to enforcing a contractual choice of forum, which is often the state whose law would be applied by contract or otherwise.

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[35] Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 Colum. L. Rev. 960, 989 (1981); *see also* von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279, 308-09 (1983).

Where personal jurisdiction over a defendant for particular conduct is available in numerous states, and where the choice of forum largely dictates the choice of law, the effect is to make the defendant subject not only to the adjudicatory jurisdiction of those states, but also to the regulatory jurisdiction of those states. As a result, a defendant could be subject to differing, and possibly conflicting, standards of care. For example, a hotel owner subject to personal jurisdiction by virtue of business solicitation in a number of states would be subject simultaneously to the various standards of care that would apply in personal injury suits brought in those states.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction over the person or, in the alternative, dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

Respectfully submitted,

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